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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	CC Docket No. 96-61 DOCKET FILE COPY ORIGINAL

OPPOSITION TO MCI TELECOMMUNICATIONS CORPORATION'S MOTION FOR STAY PENDING JUDICIAL REVIEW

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December 24, 1996

SUMMARY

The Federal Communications Commission should deny MCI's request for stay of the Commission's Order, which requires mandatory detariffing of interstate, interexchange services, because MCI fails to satisfy the applicable legal test.

First, MCI fails to demonstrate that it is likely to prevail on the merits of its appeal. MCI relies on the dictionary definition of "forbear" to prove that Congress authorized the Commission to adopt a permissive detariffing regime only, an argument that ignores decisions by federal agencies and courts construing similar statutory provisions to authorize this Commission and other regulatory agencies to prohibit the filing of rate schedules by regulated entities. MCI does not discredit (or even address) these precedents, nor does it make a persuasive case that the Commission's mandatory detariffing decision is arbitrary or capricious and thus likely to be overturned on appeal.

Second, MCI fails to demonstrate that it will suffer irreparable harm if the Order is not stayed. The nine-month period provided by the Commission for a transition from a tariff-based to a contract-based environment undercuts any suggestion that MCI faces imminent injury. Moreover, MCI fails to substantiate its claims that it will incur enormous costs in migrating its residential and small business customers to what will undoubtedly be highly standardized contracts. Its claims are particularly unpersuasive given that other businesses do precisely what MCI claims it cannot do without suffering great harm. Lastly, MCI's claim

that denial of a stay will lead to uncertainty in the large and mid-size business customer market is similarly unpersuasive. Both carriers and customers can take steps to ensure, through contractual provisions, that each benefits from the bargain struck in the event services are once again tariffed. MCI has not made out a case of likely irreparable harm.

Third, a stay would substantially harm MCI's customers. For years, customers have faced significant risks because of the filed rate doctrine, a regime that MCI has been swift to take advantage of to the detriment of its customers. A stay of the Commission's Order would extend this regime.

Finally, MCI has produced no evidence that a stay would be in the public interest. Congress provided that a determination by the Commission that forbearance is pro-competitive offers a sufficient basis for concluding that forbearance serves the public interest. The Commission made the requisite findings, concluding that mandatory forbearance will enhance competition, which will, in turn, achieve objectives that are in the public interest. MCI challenges neither finding, and thus fails to prove the last element required for granting a stay of the Order.

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The Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America hereby submit their opposition to the motion for a stay of the Commission's Second Report and Order in this proceeding filed by MCI Telecommunications Corporation on December 18, 1996 ("MCI Motion").[1]

The Commission's decision to require nondominant carriers to cancel their tariffs for interstate interexchange services is well-supported by the Order and the record in this proceeding. MCI's Motion for Stay is without merit. MCI fails to show that its appeal of the Order is likely to succeed on the merits, that it will suffer irreparable harm if a stay is not granted, that others will not be harmed by

[1] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61, Second Report and Order, FCC 96-424 (released October 31, 1996), 61 Fed. Reg. 59340 (November 22, 1996) (hereinafter the "Order"). In comments and reply comments in this

a stay, and that the public interest will be served by a grant of MCI's Motion. The Commission therefore must deny MCI's Motion for Stay.

I. THE COMMISSION MAY GRANT MCI'S MOTION ONLY IF MCI SATISFIES ALL ELEMENTS OF THE LEGAL STANDARD GOVERNING REQUESTS FOR STAY

A request for stay "is an extraordinary remedy and must be sparingly granted."[2] To grant a stay of the Order, the Commission must find that: (1) MCI is likely to succeed on the merits of its appeal; (2) MCI will "suffer irreparable harm" without a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) a stay is in the public interest.[3]

Although this test is a "flexible" one, it is not, as MCI argues, met if only one prong is satisfied. To the contrary, the U.S. Court of Appeals for the D.C. Circuit has stated that "*[d]espite* this flexibility, we require the moving party to demonstrate at least 'some injury' . . . since 'the basis of injunctive relief in the federal courts has always been irreparable harm.'"[4] Thus, MCI's argument that "a strong showing" of either irreparable harm or the likelihood of prevailing on the

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proceeding, the undersigned organizations and companies urged the Commission to require mandatory detariffing for the very reasons cited by the Commission in the Order.

[2] *People for the Ethical Treatment of Animals, Inc. v. Barshefsky*, 925 F. Supp. 844, 846 (D.D.C. 1996), *citing Dorfmann v. Boozer*, 414 F.2d 1168 (D.C. 1969).

[3] *Sea Containers Ltd. v. Stena AB.*, 890 F.2d 1205, 1208 (D.C. 1989), *citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). *See also In Re Deferral of Licensing of MTA Commercial Broadband PCS*, 61 Fed. Reg. 19623 (May 2, 1996).

[4] *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. 1995) (emphasis added).

merits "is enough to warrant granting a stay pending judicial review" is wrong.[5] MCI must prove at least some degree of irreparable harm, as well as the likelihood of prevailing on the merits, in order for the Commission to grant MCI's motion for stay.[6] Although the Commission may accept a less-than compelling showing on the likelihood of success on the merits, it can do so only if *all* of "the other three factors strongly favor interim relief."[7]

Here, MCI fails to satisfy any of the elements for grant of a stay.

II. MCI FAILS TO DEMONSTRATE THAT IT WILL LIKELY PREVAIL ON THE MERITS

MCI argues that Section 10(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, authorizes the Commission to adopt a regime of permissive forbearance only, and not the mandatory forbearance rules set forth in the Order.[8] In support of its claim, MCI cites dictionary definitions of the word "forbear" and argues that Congress must have intended for the ordinary meaning of this term to apply because there is no strong evidence of legislative intent to the contrary.[9]

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5 MCI Motion at 4.

6 *CityFed Financial Corp.*, 58 F.3d at 747; *see also Sea Containers*, 890 F.2d at 1210-1211.

7 *People for the Ethical Treatment of Animals*, 925 F. Supp. at 847 (emphasis added), *citing Holiday Tours, Inc.*, 559 F.2d at 843.

8 MCI Motion at 6.

9 MCI Motion at 7-8. MCI cites both *Richards v. U.S.*, 396 U.S. 1 (1962) and *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) to support its argument that the Commission was obligated to look to "the ordinary meaning of language" when interpreting Section 10(a). Although both cases agree that the statute itself is the best place to start when interpreting statutory language, neither goes so far as to state that a review of the "ordinary

The interpretation urged by MCI was expressly (and correctly) dismissed by the Commission as inconsistent with the historical use of this term by the Commission, the Congress and the U.S. Court of Appeals for the District of Columbia.[10] MCI ignores the fact that, for the past decade, the Commission has used various forms of the word "forbear" to refer to mandatory, as well as permissive, de-tariffing.[11] This was the context in which Congress adopted Section 10(a) of the Act, and it is within this regulatory and historical context that the word "forbear" used in that provision should be construed.

MCI also ignores decisions by federal agencies and the courts, which have construed similar statutory provisions to authorize agencies to prohibit the filing of rate schedules by regulated entities.[12] For example, the 1993 amendment to the Communications Act gave the Commission authority to

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meaning of the language" alone is sufficient. In *Richards*, the Supreme Court stated that "a section of a statute should not be read in isolation of the whole Act, and that in fulfilling [its] responsibility in interpreting legislation," the Court must look to the "whole law, and to its object and policy." *Richards*, 396 at 11. Similarly, although the Court in *Consumer Product Safety Comm'n* stated that "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive," it went on to thoroughly analyze the legislative history before reaching its conclusion. *Consumer Product Safety Comm'n*, 447 U.S. at 108. MCI asks the Commission to defer to Webster's dictionary, without first analyzing the historical usage of the word in the telecommunications and other statutory contexts. This approach goes against logic and is unsupported even by the cases cited in MCI's own Motion.

10 *See* Order at ¶¶ 71-72.

11 *See Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Sixth Report and Order, 99 F.C.C. 2d 1020, 1027 (1985) (ordering "cancellation of forborne carrier tariffs"); *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, 1480 (1994) ("*CMRS Order*") ("[W]e will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers.").

12 *See* Order at ¶ 74; *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819 (D.C. Cir. 1980).

"specify by regulation [provisions of Title II] as inapplicable to [commercial mobile radio services]."[13] Based on this authority, the Commission adopted a mandatory deregulatory regime.[14] Similarly, the Civil Aeronautics Board (CAB) adopted a mandatory deregulatory regime based on the 1978 amendment to the Federal Aviation Act, which gave the CAB authority "to exempt from the requirements of this title . . . any person or class of person if it finds that such exemption is consistent with the public interest."[15]

MCI's argument -- that forbearance from applying a requirement cannot mean the preclusion of voluntary compliance -- could theoretically apply to each of these statutes. By MCI's logic, the authority to "specify [certain statutory requirements] as inapplicable" to commercial mobile radio services could not possibly mean that the Commission may preclude voluntary compliance with those requirements. Nor could the authority to "exempt [a carrier] from the requirements of this title" possibly be construed to mean that the CAB may preclude voluntary compliance. And yet, both statutes were construed by their implementing agencies as conferring authority to adopt mandatory deregulation. The similarity in the language used in all of these statutes -- that the agency has the authority to

13 47 U.S.C. § 332(c)(1)(A).

14 The Commission read the authority granted by the statute -- which it described as "forbearance authority" -- as encompassing both permissive and mandatory de-tariffing. *CMRS Order*, 9 FCC Rcd at 1475.

15 *Airline Deregulation Act of 1978*, 92 Stat. 1705, 1731-32 (October 24, 1978).

- exempt certain entities from a requirement
- specify that a requirement is not applicable
- forbear from applying a requirement

-- *supports* the Commission's view of its authority here.

The D.C. Circuit agrees. In *National Small Shipments Traffic Conference, Inc. v. CAB*, the petitioners argued that, under the Federal Aviation Act, the CAB's "authority to exempt airlines from certain requirements cannot be used to prohibit airlines from filing [inter-carrier] agreements . . . if they choose to do so."[16] The court flatly rejected that contention, describing the agency's exemption authority as "broad" and noting that the CAB's refusal to permit filing of inter-carrier agreements was consistent with Congress's deregulatory purpose. The claims made -- and rejected -- in that case are virtually identical to MCI's meritless "forbearance" arguments in this case.

MCI's argument that the Commission has acted arbitrarily and capriciously, warranting a stay of the Order, is similarly flawed. The Commission found that tariffs are not necessary to ensure that the rates and practices of non-dominant carriers for their domestic interstate interexchange services are just and reasonable and not unlawfully discriminatory.[17] It also found that the highly elastic demand for such services makes the market a viable protector of the public interest, especially when bolstered by the agency's complaint process and

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16 *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 835 (D.C. Cir. 1980).

17 Order at ¶ 21.

the availability of remedies under state consumer protection and contract law.[18] These findings are well-supported by the record.

MCI demonstrates only that the Commission's Order may need to be clarified or modified in some limited respects. It is true, for example, that the Commission's disclosure requirements applicable to carrier rates and other terms and conditions are vague and that, if broadly construed, would appear to be inconsistent with the Commission's stated concern that the publication of such information in tariffs may encourage tacit price collusion among the carriers.[19] In fact, the undersigned organizations and companies have filed a Petition for Clarification and Partial Reconsideration (filed December 23, 1996) asking the Commission to clarify the scope of the disclosure requirement in a manner that is consistent with the stated purposes of the Order. A clarification on this point (and perhaps others as well) – not the perpetuation of the current regulatory regime – would best serve the public interest.

MCI's sweeping, conclusory statements ignore case precedent and omit crucial facts. MCI's Motion fails to prove that the Commission's decision was unsupported or that a stay of the Order is appropriate here. For these reasons, its Motion must be denied.

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18 Order at ¶ 38.

19 *See* MCI Motion at 3.

III. MCI WILL SUFFER NO IRREPARABLE HARM IF THE COMMISSION'S ORDER IS NOT STAYED

The basis for the extraordinary relief MCI is seeking in this case – a stay of the Commission's Order – rests in substantial part on the nature and extent of the injury MCI will suffer if the Order becomes effective pending appeal. As this Commission and the courts have declared, "the injury must be both certain and great; it must be actual and not theoretical . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."[20]

None of the harms MCI alleges -- the "enormous" cost of compliance, exposure to "an onslaught of litigation" in the wake of detariffing, disruption because MCI will be unable to enter into contracts with casual callers, and the "pall of uncertainty" that will be cast over the large and mid-sized business market in which MCI and its competitors typically enter into multi-year customer-specific service agreements – are credible examples of the kind of imminent, certain and irreparable injury that would warrant the extraordinary relief MCI is requesting.

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20 *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5585, ¶ 9 (1003), *citing Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D. C. Cir. 1985); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours Inc.*, 559 F. 2d at 842-43; *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir 1958).

A. MCI's Claims As To The Effect Of The Order On Its Mass Market Customers Are Speculative And Unsubstantiated.

"[T]he party seeking injunctive relief must show that '[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm."[21] Under the Order, MCI's mass market tariffs – which govern its relationships with residential and small business customers – need not be withdrawn until September 22, 1997.[22] Given the length of this phase-in period, MCI's first three claims (the cost of compliance, the "onslaught" of litigation, and problems with casual users) do not pose an imminent threat justifying a stay of the Commission's Order. Those claims will not be ripe until September, and then only if MCI's appeal of the Order is still unresolved.

In any event, MCI's allegations of irreparable injury are not (and cannot be) substantiated. Without submitting affidavits or other factual proof, MCI asks this Commission to issue a stay of the Order based on its assertion that it will cost "tens of millions of dollars even to ... establish contracts using standardized forms with its millions of customers."[23] This claim is precisely the type of

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21 *Wisconsin Gas Co. v FERC*, 758 F.2d at 674 (quoting *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (emphasis in original).

22 Order at ¶ 89.

23 MCI Motion at 15.

speculative and unsubstantiated allegation of economic harm that the courts (and the Commission) have rejected in the past.[24]

Moreover, MCI offers no reason why it cannot avoid the claimed injury by establishing standard contracts with its mass market customers through bill inserts containing terms and conditions of service that will be deemed accepted upon the customer's first use of MCI's service after the inserts are received. This is precisely the way the consumer credit card industry does business with its millions of customers. Closer to home, it is also similar to the way Sprint Spectrum is establishing contracts with its PCS customers in the Washington metropolitan area.[25]

The incremental cost to MCI of preparing and sending appropriate inserts will be properly measurable in *cents* per customer – not tens of millions of dollars – and certainly is not the type of certain and unrecoverable economic loss necessary for a finding of irreparable injury justifying a stay of the Commission's Order.[26]

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24 *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (rejecting request for stay of FERC order because pipeline companies failed to provide proof of claimed economic loss), *Reynolds Metal Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir 1985) (emphasizing the "stringency of the requirement that irreparable injury be 'likely' to occur" and rejecting as speculative and unsubstantiated the allegations of power customer of "direct, immediate and severe" harm in the form of "huge additional costs"); *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Reconsideration and Petitions for Stay, 8 FCC Rcd 6393 (1993) (rejecting telephone companies' claim that they would incur unrecoverable costs in providing notice and obtaining disclosure authorization from customers during the pendency of their appeal of a Commission order requiring tariffing of billing name and address service).

25 *See* Attachment A, copy of Sprint Spectrum Terms and Conditions of Service.

26 Recoverable monetary loss cannot constitute irreparable harm unless it "threatens the very existence of the movant's business." *Wisconsin Gas Co. v. FERC*, 758 F.2d at 674. MCI does not make this claim in its Motion. Moreover, MCI's pleading is internally inconsistent on the

Finally, MCI alleges that "the process of replacing tariffs with contracts will likely expose MCI and other carriers to an onslaught of litigation."[27] This claim is equally fraught with exaggeration and speculation. For example, MCI claims that it is "unclear" what its obligations under state law will be and that it "may be" barred by state law from migrating customers to contracts by means of so-called "negative option" mechanisms. Neither possibility leads to the conclusion that MCI will be irreparably harmed by an "onslaught of litigation." As stated previously, MCI's relationship with its customers will continue to be governed by tariff until September -- more than enough time for MCI to determine its obligations under applicable law. At this time, MCI's claims of irreparable harm are merely speculative.

B. Contract Protections Will Minimize Uncertainty In The Large User Market During The Transition From Tariffs To Contracts.

MCI's final claim -- that denial of a stay will "cast a pall of uncertainty" over the market for large and mid-size customer business customers – does not justify a finding of irreparable harm. As previously noted, for the vast majority of customer-specific arrangements – those in effect prior to December 22, 1996 –

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question of whether or not its costs are recoverable. On the one hand, MCI states (without explanation) that its costs are "unrecoverable." MCI Motion at 15. On the other hand, MCI argues that the public interest would be served by a stay of the Order because "implementation of the Order would impose significant costs on carriers that would likely be passed on to consumers." MCI Motion at 17. Given that all interexchange carriers must migrate their mass market customers to contracts and therefore no one carrier will be put at a competitive disadvantage if it seeks to recover the costs of the migration from its customers, MCI's assertion that its costs are "unrecoverable" is puzzling.

27 MCI Motion at 15-16.

there is no immediate concern regarding the status of the relationship between MCI and its customers. As the Order indicates, during the nine month transition period, those arrangements will continue to be governed by the customer-specific tariff previously filed by MCI.[28]

The only immediate issue for MCI is the status of new or amended customer-specific arrangements signed after December 22, 1996. MCI claims that, if it is successful on appeal, the contracts it enters into during the pendency of its appeal "*could* be found to be without legal effect" and, as a result, "[c]ustomers *may* refuse to pay" for the services provided pursuant thereto.[29] In order to sustain a showing of irreparable harm, however, MCI "must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future."[30] MCI merely speculates that customers will refuse to pay for services received pursuant to contract. It is telling that MCI is silent as to whether it experienced such nonpayment problems in 1993 when it migrated customers from contracts to customer-specific tariffs in the wake of judicial decisions leading up to the Supreme Court's ruling invalidating the Commission's forbearance policy.

MCI also claims that customers, "if they pay at all, may raise subsequent claims based on the statutory requirements . . . that rates be

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28 Order at ¶ 89.

29 MCI Motion at 17 (emphasis added).

30 *Wisconsin Gas Co. v. FERC*, 758 F.2d at 674.

nondiscriminatory."[31] It is unclear what MCI means by this statement, particularly in light of the fact that the Order expressly reaffirms that Section 202(a) of the Act applies to nondominant carriers regardless of whether they are doing business by tariff or by contract.[32] Neither granting nor denying the requested stay will prevent customers from exercising their statutory rights to challenge unlawful discrimination by MCI or any other nondominant carrier.

To the extent that there is any uncertainty regarding the status of contracts entered into after the effective date of the Order, MCI can take (and already may be taking) steps to prevent the unlikely scenario postulated by its Motion from coming to pass. It is our understanding that carriers have begun to include clauses in contracts with their customers that obligate the parties to execute such amendments or new agreements as may be necessary to preserve each party's rights (including the same rates, charges, discounts, term and volume commitments) if, at any time during the term, the carrier files a tariff for any of the services provided pursuant to the contract. MCI is certainly free to negotiate some version of this clause and to refuse to sign any contract that is unsatisfactory on this point.[33] In other words, MCI has within its power the ability to avoid entirely the supposedly irreparable injury of which it complains.[34]

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31 MCI Motion at 17.

32 Order at ¶ 111.

33 We urge the Commission to inquire whether MCI has in fact taken steps to provide for the possibility that its contracts will be tariffed.

34 Further evidence of the questionable nature of MCI's claim that it will be irreparably injured if customer contracts are detariffed is the changing nature of MCI's position on the efficacy

IV. A STAY WOULD HARM MCI'S CUSTOMERS

MCI argues that no other party would be substantially harmed by the grant of a stay because the relationship between consumers and carriers has been governed by tariff for over sixty years. Contrary to MCI's assumption, customers have been disadvantaged by the filed rate doctrine for years.[35] The continued applicability of that regime during the pendency of MCI's appeal will perpetuate the risks that customers currently face.

It is noteworthy that MCI has been a leading offender in taking advantage of the status quo. In 1995, for example, MCI tariffed a provision that automatically renews certain multi-year service arrangements unless the customer "provides written notification to cancel the [plan], which must be received by MCI not less than 30 days prior to the expiration of the term."[36] Customers who negotiated Special Customer Arrangements (SCAs) with MCI that neither stated nor implied any such notice requirement now face substantial penalties if they seek to exercise their bargained-for right to change carriers at the end of the agreed-upon service term.[37]

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of detariffing customer-specific arrangements. Just a few short months ago, MCI had no objection to the detariffing of these arrangements, noting in its comments filed with the Commission in this docket that its own interests and those of its large customers "will be better served" without tariffs. MCI Comments at 27.

35 *See Marco Supply Co. v. AT&T Communications,* 875 F.2d 434 (4th Cir. 1989).

36 MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section C.3.18372. By adding such a clause to its tariff, MCI may have invited the very type of litigation that it says would constitute irreparable harm. *See* MCI Motion at 16 (citing the risk of challenges to "unlawful negative option" provisions).

37 MCI has also undertaken tariff changes that deprive customers of bargained-for rights to terminate prior to the expiration of the service term. In March 1994, without securing the consent

At about the same time, MCI also added rules for arbitrating payment disputes that require customers, as a condition of taking service, to waive important legal rights, including their statutory right to a Commission or court determination of the validity of MCI's charges.[38] In a more recent filing, MCI has modified its tariff provisions relating to toll fraud so as to make its SCA and other customers strictly liable for all unauthorized use occurring after either the customer notifies MCI or MCI notifies the customer of suspected fraud.[39] This shift of all liability to the customer effectively abrogates any contractual commitment previously made by MCI to honor any customer-requested call blocking to minimize fraud.

MCI's recent change to its F.C.C. Tariff No. 1 to increase certain tax-related surcharges, thereby shifting a greater portion of MCI's state tax burden onto its customers, is yet another reminder of how MCI has used the filed rate doctrine to the detriment of its customers. In April of 1996, MCI amended its

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of all affected customers, MCI increased customer liability for terminating a Vision VIP Plus term plan. Prior to that date, the customer was liable for any commitment applicable to the year in which the termination occurred, plus an amount equal to 35% of the commitments for any subsequent years remaining in the term. The amendment added that the customer would also be required to repay any promotional credits previously given. *See* MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section C.3.183752.

38 The provision allows MCI to compel arbitration of disputes in excess of $10,000, and forbids the arbitrator from awarding "any interlocutory relief, including temporary or preliminary injunctions," "penalties other than those provided in any applicable publicly filed tariff," or "attorneys fees." MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section B.7.13812. This makes it impossible for a customer to prevent a cutoff of service while the arbitration proceeds and deprives the customer of rights guaranteed by the Communications Act. The tariff also states that the arbitrator must apply the relevant terms of MCI's tariff and "has no authority under any circumstances to deviate from or abrogate" the terms of that tariff -- regardless of how unjust or unreasonable or unreasonably discriminatory they might be. MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section B.7.13811.

39 MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section B.4.102.

tariff to include a pass-through to the customer (in the form of a surcharge) of all state ad valorem taxes on MCI's interstate property.[40] Prior to that change, the tariff allowed MCI to pass through to customers only two kinds of state taxes. The resulting change substantially altered (in MCI's favor) the bargained-for terms of the individual contracts MCI negotiated with its SCA customers.

V. THE PUBLIC INTEREST WILL BE HARMED BY A GRANT OF MCI'S MOTION

Section 10(b) of the Communications Act states that "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[41] The Commission's public interest findings heed this instruction.

In the Order, the Commission found that mandatory detariffing will "enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine . . . and establishing market conditions that more closely resemble an unregulated environment."[42] The Commission further found that, overall, the pro-competitive effects of detariffing outweigh any potential increases in carriers' administrative

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40 MCI Telecommunications Corp., F.C.C. Tariff No. 1, Section B-7.08.

41 47 U.S.C. 160(b).

42 Order at ¶ 52.

or transactional costs.[43] The Commission's findings, made pursuant to Section 10(b) of the Act, compel a finding that mandatory detariffing is in the public interest.

MCI does not challenge the Commission's finding that mandatory forbearance is pro-competitive, a finding that forms the basis for the Commission's conclusion that forbearance is in the public interest. Instead, MCI simply draws upon its previous arguments, citing potentially "significant costs" to the public and "uncertainty." MCI makes no persuasive argument that a stay is in the public interest.

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43 Order at ¶ 57.

CONCLUSION

For the reasons stated, the Commission should deny MCI's Motion for a Stay of the Order or, alternatively, limit the scope of any portions of the Order where the applicable legal standards have been met.

Respectfully submitted,

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Dated: December 24, 1996

200.04/Forbear/Oppstay

Certificate of Service

I, Andrew Baer, hereby certify that true and correct copies of the preceding Opposition of the Ad Hoc Telecommunications Users Committee to Motion for Stay Pending Judicial Review submitted by MCI Telecommunications Corp. in CC Docket 96-61, were served this 24 day of December, 1996 upon the following list.

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